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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC. and NATIONAL RIGHT TO WORK COMMITTEE,

Petitioners,

—v.—

HONORABLE CHARLES R. RICHEY, District Judge, United States District Court for the District of Columbia,

Respondent.

PETITION FOR WRITS OF CERTIORARI AND MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") and National Right to Work Committee ("Committee") petition for writs of certiorari and mandamus to review the per curiam decision and order of the United States Court of Appeals for the District of Columbia Circuit filed on March 17, 1975 denying the petition for writ of mandamus brought by the Foundation and Committee against District Judge Charles R. Richey. The Court below thereby left standing the order of the United States District Court for the District of Columbia which orders the disclosure to the plaintiffs of names of

Foundation contributors and the amounts of their contributions.*

Opinions Below

The decision and order of the Court of Appeals, filed March 17, 1975, is unreported (17A).** The opinion of the District Court is reported at 376 F. Supp. 1060 (1A). The order of the District Court, which was left standing by the Court of Appeals, is unreported (9A).

Jurisdiction

The decision and order of the Court of Appeals was filed on March 17, 1975 (17A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §1651(a).

Questions Presented

1. Whether a writ of mandamus should issue to void a District Court disclosure order which, on the basis of no evidence of illegal activity, finally determines and overrides First Amendment rights.

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* This petition necessarily reiterates many points stressed in our earlier petition this Term for a writ of certiorari to the same Court of Appeals (No. 74-645). The procedural context is, however, now radically different. The earlier petition, which was denied on January 27, 1975, premised jurisdiction in substantial part on the finality of the disclosure order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949) and its progeny. The present petition primarily premises jurisdiction on the broad power of mandamus as articulated in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964) and analogous cases.

** Citations with the suffix "A" are to the Appendix hereto.

2. In this action under the Landrum-Griffin Act to bar legal assistance to needy workers from the Foundation, a tax-exempt legal aid organization, should the First Amendment rights of privacy and freedom of association of Foundation contributors be overridden and the Foundation's ability to provide free legal services be impaired, in the absence of any evidence of illegal activity, by a District Court order requiring disclosure of contributors' names and the amounts of their contributions?

Constitutional and Statutory Provisions Involved

This case involves the First, Fourth, Ninth and Tenth Amendments to the United States Constitution.

This case also involves 28 U.S.C. §1651(a) which provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This case also involves §101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 ("Act"), known as the "Landrum-Griffin Act", 73 Stat. 522, 29 U.S.C. §411 (a)(4), which provides that:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to

petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."

Since the instant case draws into question the constitutionality of the Landrum-Griffin Act, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable. To our knowledge, no court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

Statement of the Case

The Foundation and the Committee are defendants in an action brought by ten national and international unions ("plaintiffs") in the District Court for the District of Columbia. Jurisdiction is alleged under §102 of the Landrum-Griffin Act, 29 U.S.C. §412; federal question jurisdiction, 28 U.S.C. §1331; and jurisdiction under a federal statute regulating commerce, 28 U.S.C. §1337. The unions assert that the Foundation acts as a conduit for "interested employer[s]" to finance litigation against various labor organizations, contrary to §101(a)(4) of the Act. They seek damages and declaratory and injunctive relief.

The Committee is a non-profit, tax-exempt corporation established in 1955 to promote voluntary unionism by various educational activities. The Foundation is an independent non-profit, tax-exempt corporation established in 1968 to give free legal assistance to needy workers injured by compulsory unionism. Both organizations are supported by contributions from the general public.

The discovery record shows total donations to the Foundation in 1972 were $1,727,572 with an average contribution of less than $22 (Larson dep. 407).* One-third of the donors identified themselves as being business contributors and their average contribution was less than $73. No single contribution was more than $5,000 and only ten contributions were between $1,000 and $5,000 each.

With its legal staff and cooperating lawyers throughout the United States, the Foundation provides legal assistance in forty cases (Larson dep. 873) challenging various unlawful aspects of compulsory unionism such as (a) racial discrimination, *e.g., Sidberry* v. *Stage Employees Local 307*, 4 FEP Cases 1272 (E.D. Pa. 1972); (b) the unauthorized use of union agency fees for political purposes, *e.g., Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9 Cir. 1970); and (c) union violence against workers who lawfully refuse to join a union, *e.g., Richardson* v. *Communications Workers of America*, 443 F.2d 974, 983-84 n. 12 (8 Cir. 1971).

In their first cause of action, the unions name 17 lawsuits in which the Foundation has supported the plaintiff workers in actions against many employers and unions. The unions charge that by such support the Foundation, the

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* Citations to "Larson dep." refer to the discovery deposition of Foundation President Reed Larson taken by plaintiff unions.

Committee and "employers giving financial support to the Foundation, implement a conspiracy between those parties to violate Section 101(a)(4) of the Act" (Amended Complaint ¶14). Without first adducing any evidence of illegal Foundation activities and without seeking discovery from Foundation-assisted workers or from the workers' employers, the unions demanded disclosure of 190 Foundation contributors and the amounts of their contributions.* The Foundation and the Committee objected, maintaining that such information was protected under the First, Fourth, Ninth and Tenth Amendments and that disclosure would violate constitutionally guaranteed privacy and freedom of association and impair the ability of the Foundation to provide legal services to needy workers.** They also argued that at a minimum, First Amendment rights should not be infringed without first exhausting all reasonable alternatives to determine "interest" such as initiating discovery of Foundation-supported plaintiffs or their employers or members of the Advisory Council.

The District Court, Hon. Charles R. Richey, J., on plaintiffs' motion, nevertheless directed disclosure and specifi-

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* The unions first filed interrogatories demanding disclosure of all contributors. After defendants objected on constitutional grounds the unions filed a motion to compel answers but narrowed their demand to (a) 37 Foundation contributors who contributed between $500 and $5,000 in 1972; (b) the first 37 Foundation contributors or the last 37 such contributors, in alphabetical order, who contributed between $100 and $500 in 1972; and (c) the amounts of contributions to the Foundation during 1971 and 1972 of the 116 companies whose officers and employees are listed as members of the Foundation's publicly identified Advisory Council. Subsequently, the unions filed three more sets of interrogatories demanding disclosure of a large number of additional names.

** For brevity, petitioners' constitutional claims are hereinafter referred to as "First Amendment rights."

cally authorized the unions' counsel to make the names known to persons undertaking further investigations (9A-10A). The District Court did not discuss petitioners' First Amendment claims nor did it determine that the unions could not establish the application of the Act's "interested employer" proviso absent disclosure of contributors' names. Thus the disclosure order irretrievably swept aside First Amendment rights without any evidentiary showing of necessity or illegal Foundation activity.

The District Court, on petitioners' timely application, declined to certify its order for interlocutory appeal pursuant to 28 U.S.C. §1292(b), stating and rejecting for the first time petitioners' First Amendment claims and concluding that "there is no other reasonable way" for the unions "to obtain the information sought" (11A-12A).

Petitioners' timely appeal from the disclosure order was summarily dismissed by the Court of Appeals on June 28, 1974 on the ground of lack of jurisdiction (14A). This Court denied a petition for writ of certiorari on January 27, 1975, 95 S. Ct. 817 (No. 74-645).

On June 27, 1974 petitioners filed a petition for a writ of mandamus in the Court of Appeals and that Court stayed enforcement of the District Court's disclosure order pending further proceedings on mandamus (15A). On March 17, 1975, the Court of Appeals denied the petition for writ of mandamus, vacated its stay without reaching the merits of the District Court's disclosure order and virtually suggested that the Foundation might properly seek review on the merits following conviction for a contumacious refusal to comply with the disclosure order (17A-30A). The Court of Appeals held that mandamus was not available to void

the disclosure order nor to decide either the constitutionality of applying the Act to the Foundation or any issues of statutory construction (22A-30A). On March 21, 1975, the Court of Appeals issued a new stay of the District Court's disclosure order pending the filing within ten days thereafter of an application for a stay in this Court. Petitioners' timely application to The Chief Justice for a further thirty-day stay pending the filing of this petition was referred by him to the whole Court and was denied on April 14, 1975 (32A). There is now no stay of the disclosure order.

REASONS FOR GRANTING THE WRITS*

POINT I

In construing the "interested employer" proviso of the Landrum-Griffin Act to authorize its order compelling the disclosure of Foundation contributors, the District Court violated First Amendment rights of privacy and freedom of association and impaired the Foundation's ability to provide free legal services to needy workers.

This case involves a national legal aid organization whose forty cases address federal labor policy and related consti-

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* The Court of Appeals had undoubted jurisdiction, if it so chose, to issue a writ of mandamus in aid of its appellate jurisdiction. *See Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953). This Court has treated writs of mandamus and certiorari as virtually indistinguishable for purposes of review here. *Ex parte Collett*, 337 U.S. 55 (1949); *Kilpatrick* v. *Texas & Pacific Ry. Co.*, 337 U.S. 75 (1949); *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949); but in order to present the fullest basis for the exercise of this Court's jurisdiction, we seek both writs.

tutional issues in state and federal courts.* Court-ordered disclosure of its contributors' names and amounts of contributions and the resulting impairment of its ability to raise funds is of national consequence. The unions have previously told this Court that they desire only *a sample* consisting of the 190 contributors from the more than 8,000 "employer-contributors" who gave money to the Foundation in 1972 (Respondents' Brief in Opposition in No. 74-645 at 1, 9, 11; hereinafter "1st Br. Opp."). The unions have not informed this Court, however, that their second set of interrogatories, which form part of the predicate for the instant petition, also demanded the names of *all* "employer-contributors" in 1972. Thus the rights of thousands of individual citizens are jeopardized if the unions succeed here.

A. The Statutory Scheme

The fundamental issue here is whether First Amendment rights of the Foundation and its contributors can be impaired—in the absence of any evidence of wrongdoing—by construing the Landrum-Griffin Act's "interested employer" proviso to require disclosure of contributors' names and contributions. Such construction is unjustified. There is no

* *E.g.*, *Abood* v. *Detroit Board of Education*, Docket Nos. 19465 and 19523 (Mich. Ct. App. March 31, 1975) (state statute authorizing agency shop provisions in public employment held not retroactive; no refund ordered of union's expenditure of agency fees for political purposes because no plaintiff specifically notified the union of the political causes he opposed); *Buckley* v. *American Federation of Television and Radio Artists*, 496 F.2d 305 (2 Cir.), *cert. denied*, 95 S.Ct. 688 (1974) (No. 74-313) (First Amendment held not to bar compulsory union dues by television commentator); *Lewis* v. *American Federation of Television and Radio Artists*, 34 N.Y.2d 265, 313 N.E.2d 735, 357 N.Y.S.2d 419, *cert. denied*, 95 S.Ct. 688 (1974) (No. 74-314) (same holding as to radio commentator). All three of these cases are among those cited in the amended complaint.

suggestion in the legislative history of §101(a)(4) that Congress intended to prohibit independent organizations like the Foundation from assisting workers' lawsuits. To the contrary, the legislative history clearly shows that the term "interested employer" was *not* to include "a friend, who happens to be an employer of people in a totally unrelated business, a bank or anything else. . . ." 105 CONG. REC. 6725 (April 25, 1969) (38A) (remarks of Senator Javits). The relevant legislative history from the Senate debate of April 25, 1959 is reproduced in the Appendix hereto (33A-38A).

A bank or "an employer of people in a totally unrelated business" is not "interested" under the statute because it has no direct economic stake in union member litigation.* It may have a general legitimate "interest", however, in the judicial resolution of labor disputes. The decisive point is that the legislative history does not proscribe such general "interest" on the part of depositors, employees or Foundation contributors.

Moreover, an "interest" born of a direct economic stake in the controversy is relevant only if related to the decision by the bank, employer or Foundation to assist a union member. Such a relationship may be easily inferred where, for example, the employer directly finances his employee's suit against a union. *E.g., Adamszewski* v. *Local 1487 Machinists*, 496 F.2d 777 (7 Cir.), *cert. denied*, 95 S.Ct.

* The unions have taken unexplained comfort in our position that the legislative history of §101(a)(4) shows a Congressional intent to bar a union member from receiving *direct* support from an employer in the same line of business as the union member's employer (1st Br. Opp. 10). This has nothing to do with Foundation assistance which, unless and until the unions adduce evidence to the contrary, presumptively results from decisions independent of any employer-contributor.

311 (1974). But the relationship cannot be presumed merely from the fact of assistance from a bank, an unrelated employer or the Foundation—all of which assumedly interpose independent judgment between the "interest" of their depositors, employees or contributors and the decision to give litigation assistance.

This is not to deny the unions' right to disclosure of contributors upon a proper constitutional predicate which is lacking here. But the unions have explicitly eschewed *any* desire to ascertain if the employers most directly involved in Foundation-supported cases—namely, the employers of the plaintiff-employees—have contributed to the Foundation (1st Br. Opp. 17 n.6). Furthermore, the unions charge without any proof whatever that the Foundation has "fomented" litigation (1st Br. Opp. 4) but they have so far refused to take the deposition of any Foundation-supported plaintiff to support this charge or to inquire if any employer had anything to do with the plaintiff's decision to seek Foundation support. The unions choose instead to label the Foundation "as a front and conduit to finance anti-union litigation" (1st Br. Opp. 17 n.6) without first endeavoring to determine by constitutionally unobjectionable means whether contributors have any influence over the Foundation's litigation decisions. Only on a showing of such influence or a demonstration—not made here—that such a showing is otherwise impossible can the unions plausibly urge that disclosure of Foundation contributors is required.

Section 101(a)(4) grew out of the findings of the McClellan Committee that industrial peace* was threatened

* The need for industrial peace is embodied in §2 of the Erdman Act of 1898, 30 Stat. 425; the Railway Labor Act, 45

by abusive union power which, *inter alia,* denied members the right to sue their unions. *See* 105 CONG. REC. 6471-72 (April 22, 1959) (remarks of Senator McClellan). Respondent unions' hyperbole that §101(a)(4) bars "employer interference in union affairs" (1st Br. Opp. 22) simply overlooks Congressional authorization, which embraces the Foundation, for non-interested employer support of union-member litigation. Moreover, in their quest for names of Foundation contributors, the unions have conspicuously failed to mention—even for the purpose of endeavoring to distinguish—that line of authority which immunizes the identities of union members from employers. *E.g., NLRB* v. *Minnesota Mining & Manufacturing Co.,* 179 F.2d 323, 326 (8 Cir. 1950); *Bhd. of Railway & Steamship Clerks* v. *Virginia Ry. Co.,* 125 F.2d 853, 858 (4 Cir. 1942).

The District Court below is alone in holding that the "interested employer" proviso applies to *all* suits by union members against their unions irrespective of whether the members' bill of rights under Title I of the Landrum-Griffin Act is in issue (6A-8A).* Every other court addressing this question, including the District Court below in an

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U.S.C. §151a; the National Labor Relations Act, 29 U.S.C. §151; the Taft-Hartley Act, 29 U.S.C. §141; and the Landrum-Griffin Act, 29 U.S.C. §401. *See also, Virginia Ry. Co.* v. *System Federation,* 300 U.S. 515, 547 (1937); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 42 (1937).

* None of the cases cited by the District Court (4A-6A) in support of its conclusion, including *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers,* 391 U.S. 418 (1968), involved the "interested employer" proviso; rather, all of them concerned the first proviso of §101(a)(4) which requires union member exhaustion of internal union remedies prior to suit. Such exhaustion in

earlier opinion in this action reported at 366 F. Supp. 46, 48 (D.D.C. 1974), has held to the contrary. *Adamszewski* v. *Local 1487 Machinists,* 496 F.2d 777, 784-85 (7 Cir.), *cert. denied,* 95 S.Ct. 311 (No. 74-231); *Verville* v. *International Ass'n of Machinists,* Civil No. 37650 (E.D. Mich. May 29, 1974) (slip op. 10), *appeal pending,* Nos. 74-1914 and 74-1915 (6 Cir.).

Title I is part of an Act described by this Court as "the first major attempt by Congress to regulate the *internal affairs of labor unions.*" *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528, 530 (1972) (Emphasis added.) None of the 17 Foundation-supported lawsuits named in the amended complaint involves a Title I right.•

Title I cases and all other cases merely codifies prior law and, in any event, is discretionary with the court. *E.g., NLRB* v. *Industrial Union of Marine & Shipbuilding Workers, supra,* 391 U.S. at 426 and n. 8; *Underwood* v. *Maloney,* 152 F. Supp. 648, 658 (E.D. Pa. 1957), *aff'd in part, rev'd in part on other grounds,* 256 F.2d 334 (3 Cir.), *cert. denied,* 358 U.S. 864 (1958); *Durkin* v. *Murray,* 90 F. Supp. 367, 368 (D.D.C. 1950); *Madden* v. *Atkins,* 4 N.Y.2d 283, 291-92, 151 N.E.2d 73, 76-77, 174 N.Y.S.2d 633, 638 (1958); *Naylor* v. *Harkins,* 11 N.J. 435, 444, 94 A.2d 825, 830 (1953).

The ban on "interested employer" financing, however, restricts a union member's pre-existing right to assistance from whomever he wishes. Section 103 of the Landrum-Griffin Act, 29 U.S.C. §413, preserves this right as to non-Title I issues such as claims under the Railway Labor Act, 45 U.S.C. §§151-188, and §301 of the Taft-Hartley Act, 29 U.S.C. §185. *Adamszewski* v. *Local 1487 Machinists,* 496 F.2d 777, 784-85 (7 Cir.), *cert. denied,* 95 S.Ct. 311 (No. 74-231).

• The unions assert (1st Br. Opp. 18 and n. 7) and the Court of Appeals relied on a similar assertion made at oral argument (26A) that five cases *not* cited in the amended complaint involve both a Title I right and Foundation support. We respectfully point out that the Foundation has supported only three of these cases. *Braden* v. *Local 146 Sheet Metal Workers,* Civil No. 2829 (W.D. Mo.); *Fishgold* v. *American Federation of Musicians,* Civil

The Foundation by definition is not an "interested employer" under §101(a)(4) because it has no economic stake in or employment relationship to any party in litigation which it supports. Congress in fact authorized an employer like a bank or a worker's friend to provide assistance to plaintiff workers; only "interested employer[s]" are barred from giving such assistance. The Foundation's general concern for plaintiff workers does not constitute "interest" under §101(a)(4). *Farowitz* v. *Associated Musicians Local 802*, 241 F. Supp. 895, 908 (S.D.N.Y. 1965).

Assuming *arguendo* the contributors are "interested" within the meaning of §101(a)(4), their "interest" is relevant only if they influence the Foundation's litigation decisions. For under the Constitution, the statute should not be read as outlawing contributions on the basis of contributors' mere beliefs. There is no evidence that the contributors have any influence over litigation and the Foundation's Policy Guidelines prohibit acceptance of any "contribution made for the purpose of financing or assisting in financing any litigation on behalf of the contributor or any employee of the contributor" (Larson dep. 899). While we do not begrudge the unions' right to explore this issue by appropriate discovery directed at Foundation staff, at Foundation-supported plaintiffs or their employers, we maintain

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No. 72 Civ. 2560 (S.D.N.Y.); *Forrester* v. *Operative Plasterers' & Cement Masons' International Ass'n*, Civil No. 2689 (W.D. Mo.), None of these three involves the plaintiff unions and no issue of Foundation support has been decided or raised. We have investigated the other two cases (*Gabauer* v. *Woodcock*, Civil No. 72 C 164(2) (E.D.Mo.) and *Huskey* v. *Woodcock*, Civil No. 72 C 165 (E.D.Mo.)) as to which the Foundation has had no role whatever; we have been reliably informed that while each of these two cases involves a Title I claim, no issue of "interested employer" financing has ever been raised.

that §101(a)(4) cannot constitutionally compel disclosure of contributors' names where, as here, the unions have made no showing that this is the only reasonable way to determine contributor "interest". The unions' position, sustained in the District Court, is that the bare allegations of their amended complaint, notwithstanding their failure so far in discovery to find *any* contributor influence over Foundation-supported litigation, warrant invasion of the contributors' First Amendment rights. For the reasons which follow, we urge that First Amendment principles require reversal of the District Court.

B. As an Important Issue of First Impression, This Court Should Grant Writs of Certiorari and Mandamus to Void a Disclosure Order Resting on No Evidence of Illegal Activities But Which Irretrievably Determines and Violates First Amendment Rights

In ordering disclosure of names of Foundation contributors and their contributions, the District Court finally determined First Amendment rights without any evidentiary proof whatever that the Foundation had engaged in any illegal activities and in the absence of any evidence that the unions had made the slightest effort to exhaust other non-objectionable means for discovery. In refusing to issue a writ of mandamus, the Court of Appeals perpetuated these errors while intimating a preference for review on the merits only after a conviction—which may never occur —for criminal contempt of the District Court's disclosure order. The Court of Appeals thus puts the Foundation, which seeks to enforce the law by judicial action, in the position of lawbreaker on the chance of possible subsequent adjudication of constitutional claims already squarely presented.

(1) *There Is No Evidence of Illegal Foundation Activity and the Unions Have Not Attempted Other Constitutionally Permissible Discovery*

The unions have taken a 964 page discovery deposition of Foundation President Larson, a 69 page deposition of the Foundation's former fund raising consultant Richard Viguerie, and a 55 page deposition of the head of the Foundation's fund raising department, Carol Park. The depositions refer *inter alia* to (a) the hundreds of magazine and other subscription lists on which the Foundation relies for its direct mail appeals (Park dep. 17-19; Viguerie dep. 18); (b) the millions of persons to whom the Foundation has sent such appeals (Viguerie dep. 18); (c) the many fund raising appeals made by the Foundation to the general public (Larson dep. 934-37); and (d) the number of workers who have sought Foundation assistance as a result of its reputation (Larson dep. 753-854). There is nothing in these depositions to suggest that any Foundation-supported lawsuit results from or is maintained by a contributor's influence or control. No doubt this explains why the plaintiff unions have never raised the "interested employer" proviso as a defense in any of the Foundation-assisted employee lawsuits of which they complain; it may also explain why the unions have not sought to take the deposition in this action of any Foundation-supported plaintiff or the employer of any such plaintiff. What it does not explain is how the absence of any evidence of contributor influence on Foundation decisions serves as a predicate for disclosure of Foundation contributors.

The unions have also propounded and the Foundation and Committee have answered or objected to three sets of

interrogatories.* None of these interrogatories directly addresses possible contributor influence on Foundation decisions.

In sum, the record below lacks a scintilla of evidence that the Foundation is a front or conduit for "interested employer[s]". On the contrary, the record affirmatively shows an organization successfully appealing to the public to support its legal aid activities. Instead of attempting *any* constitutionally acceptable discovery such as interrogatories to, or depositions of, Foundation-supported plaintiffs or their employers or Advisory Council members, the unions have precipitated a constitutional confrontation by seeking individual contributors' names and amounts of contributions directly from the Foundation. But this Court has made clear in the criminal context that convictions based on no evidence offend the Due Process Clause, *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). No less a rule should shield First Amendment rights where private plaintiffs have made no attempt at an evidentiary showing of illegality and no necessity exists for subordinating such rights merely to pre-trial tactics.

(2) *Mandamus Is Both Preferable to Review After Contempt and Necessary to Supervise the Disclosure Order Affecting First Amendment Rights*

In *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), this Court approved the use of mandamus to review a substantial issue of first impression, namely, whether a district

* A fourth set of plaintiffs' interrogatories was propounded while the mandamus petition was *sub judice* in the Court of Appeals. The District Court has not ruled on the unions' motion to require answers notwithstanding the then outstanding stay of the disclosure order by the Court of Appeals.

court in a diversity action could order a defendant's mental or physical examination under Fed. R. Civ. P. 35, 379 U.S. at 110. Citing and quoting from *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953), this Court held that the writ appropriately issued where "there is 'usurpation of judicial power' or a clear abuse of discretion" 379 U.S. at 110. This Court determined that the writ was appropriate to review the district court's Rule 35 order and held that the parties seeking the physical and mental examinations had failed to establish in their conclusory pleading and an attorney's affidavit that the defendant bus driver's physical and mental condition was in controversy or that there was good cause for such examinations. 379 U.S. at 119-21. In addition, this Court noted that the court-ordered examinations were in very broad areas which might extend to matters whose relevance was difficult to conceive. 379 U.S. at 121 n. 16.

All the principal factors supporting review in *Schlagenhauf* are present here: (1) a substantial issue of first impression, namely, court-ordered disclosure under §101(a)(4) impairing a legal aid organization's First Amendment rights; (2) usurpation of judicial power and a clear abuse of discretion in that the District Court ordered disclosure in the teeth of a record which affirmatively demonstrated the legality and constitutionally protected nature of the Foundation's activities; (3) the unions' unsupported allegations in their amended complaint as the only purported basis for disclosure, whereas in *Schlagenhauf* the pleadings plus an attorney's affidavit were insufficient for the physical and mental examinations; (4) the selection of names for disclosure in a way that bears no relationship to the Foundation's legal aid program—"[i]t is hard to conceive how

some of these could be relevant under any possible theory of the case." 379 U.S. at 121 n. 16.

As in *Schlagenhauf*, this does not mean the unions must prove their case "on the merits in order to meet the requirements" of the Constitution; it does mean, however, that the unions "must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule." 379 U.S. at 119. Since the Rule requires *inter alia* "good cause shown", there is no reason why impairment of First Amendment rights should be subjected to a lesser standard.

In addition to meeting all the principal *Schlagenhauf* tests, the instant case is even more compelling for review on mandamus because at stake is a unique construction of the "interested employer" proviso which has never been passed upon by this Court in a context where (a) the very existence of the Foundation's First Amendment rights is imperiled without any evidence of illegality and (b) the disclosure order if upheld will threaten the Foundation's fund raising efforts and thus have wide impact in state and federal courts where Foundation-supported litigation is pending.

In holding that the disclosure order was "clearly within the district court's jurisdiction to entertain" and was not a "'clear usurpation of judicial power'" (26A), the Court of Appeals failed to distinguish between the power to decide the question and the want of any basis upon which to order disclosure. In neither *Schlagenhauf* nor *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), where this Court approved mandamus to guide the district court practice of references to masters, was there any question about the trial court's jurisdiction to act. The issue in both cases,

as here, was whether the district court's order was so abusive, so manifestly without any plausible basis in the record, as to constitute judicial usurpation of power. Plainly this issue cannot be decided by referring, as did the Court of Appeals (27A), to the fact that the trial court said the disclosure order was properly entered under *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *petition for cert. dismissed*, 417 U.S. 938 (1974). Assuming the applicability here of *Carey* principles permitting disclosure of a newspaperman's source in a libel action on an evidentiary showing that all other reasonable means had been exhausted and the requested disclosure went to the heart of plaintiff's claim, the District Court's mere recitation of those principles (27A) is of little value where the record shows no basis for applying them in aid of disclosure.

The Court of Appeals also mistakenly found mandamus inappropriate here because *Carey* "has set forth all of the 'advice' necessary" (27A). This view overlooks the precedents available to the district courts in *Schlagenhauf* (*see* 379 U.S. at 110 and nn. 5-6, 113-14) and especially *La Buy* (*see* 352 U.S. at 256-58) where the Seventh Circuit over a twenty-year period had admonished district courts regarding the practice of referring cases to masters. Put bluntly, unheeded advice from precedents and gross abuse of discretion require intervention by mandamus, a point apparently endorsed by the Court of Appeals only if "the district judge *deliberately* or persistently disobeyed any order or rule of this court" (26A). (Emphasis added.) The meaning of "deliberately" is not clear in this context if it does not apply to the disclosure order which flouts *Carey* principles on a record having none of the evidence which *Carey* deemed essential for such an order.

Moreover, the Court of Appeals recognized that mandamus is appropriate "where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible", instancing rules of procedure (23A; see also 25A). The Court of Appeals found this principle inapplicable here even though this very case directly affects Foundation support of forty other cases all over the country.* It requires no powers of divination to conclude that disclosure of contributors' names here will result in other disclosure requests at least in cases listed in the unions' first cause of action. No doubt the reason the unions have refrained from pursuing the issue of Foundation support in these cases is their desire for precedent here which will then be invoked for even wider disclosure elsewhere. In addition, the denial of effective review here can similarly be used to defeat such review in those cases. The criteria set out for mandamus by the Court of Appeals therefore apply with special force because in none of the authorities it cited** was a party opposing mandamus so well situated as the unions here immediately "to confront a number of lower court judges in a number of suits before appellate review is possible . . ."

While characterizing as our "best argument" the point that disclosure of contributors' names "will effectively deny adequate review because the harm feared—disclosure—will be irremediable" (27A), the Court of Appeals de-

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* *See, e.g., Ellis* v. *Bhd. of Railway, Airlines & Steamship Clerks,* Civil Nos. 73-113-N and 73-118-N (S.D. Cal.); *Knight* v. *Minnesota Community College Faculty Ass'n,* Civil No. 4-74-659 (D. Minn.); *Gabauer* v. *Woodcock,* Civil No. 72 C 180(A) (E.D. Mo.).

** *Schlagenhauf* v. *Holder, supra; Colonial Times, Inc.* v. *Gasch,* 509 F.2d 517 (D.C. Cir. 1975); *United States* v. *Hughes,* 413 F.2d 1244 (5 Cir. 1969), *vacated as moot,* 397 U.S. 93 (1970).

clined to follow the Fourth, Seventh, Ninth and Tenth Circuits in holding that mandamus was appropriate even in non-constitutional but privileged areas (27A and n. 8). *United States* v. *Hemphill*, 369 F.2d 539 (4 Cir. 1966) (informer privilege); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7 Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348, *rehearing denied*, 401 U.S. 950 (1971) (attorney-client); *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9 Cir. 1961) (trade secret); *Metros* v. *United States District Court*, 441 F.2d 313 (10 Cir. 1970) (informer privilege).

This refusal—resulting in conflict among the Circuits—was founded on the purported availability of contempt as a means for preserving the constitutional rights of the Foundation and its contributors pending appellate review (28A and n. 8). By implication the Foundation was seen as having an incentive to subject itself to contempt which presumptively was lacking in the parties ordered to disclose in such cases as *Harper & Row* and *Hartley Pen*, that is, the Foundation would be directly hurt by disclosure whereas in these three cases "the party against whom the order was issued was not the party injured by disclosure" (27A-28A n. 8). On analysis, this distinction is artificial as to *Hartley Pen* and *Harper & Row*. In *Hartley Pen* disclosure of the trade secret leased to the plaintiff (against whom the order was issued) would have impaired his business and he was thus directly endangered by disclosure. In *Harper & Row* disclosure was directed at privileged documents evidently in the hands of attorneys; their disclosure would have impaired if not destroyed the attorneys' ability effectively to represent their clients.

The thrust of the Court of Appeals' decision, however, is less to justify its refusal to follow other Circuits in permitting mandamus in appropriate civil cases than to suggest that this Court's disapproval of interlocutory appeals bars the writ here.

The Court of Appeals sought support for its position in a line of interlocutory appeal cases extending from *Alexander* v. *United States*, 201 U.S. 117 (1906) through *Cobbledick* v. *United States*, 309 U.S. 323 (1940) and *United States* v. *Ryan*, 402 U.S. 530 (1971). But none of these cases involved jeopardy to First Amendment rights whose very nature requires breathing space in order to be effective. The *Alexander*, *Cobbledick* and *Ryan* witnesses were interposing a personal privilege to foreclose discovery, a privilege completely satisfied at the time of individual assertion. The Foundation's resistance to disclosure of its contributors is based, on the other hand, on both its constitutional status and that of its contributors. Disclosure would thus impair not only the Foundation's rights but also chill the exercise of First Amendment rights by contributors whose names were revealed as well as other contributors and those desiring to contribute who legitimately might fear exposure of their contributions and possible reprisals. Insofar as *Cobbledick* and *Ryan* implicate a special concern for expedition in criminal cases as a ground for dismissing interlocutory appeals, *Will* v. *United States*, 389 U.S. 90 (1967), makes clear that the *Schlagenhauf-La Buy* mandamus principles in civil litigation are not undermined. 389 U.S. at 100 n. 10. *See also United States* v. *Ryan*, 402 U.S. at 533.

The Court of Appeals elided these issues by attempting an analogy between criminal and civil cases using the citation of *Cobbledick* in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943) (29A). But reliance on *Roche*, which grew out of a criminal case, as authority for refusing to issue mandamus is dubious at best since it was decided twenty years before *Schlagenhauf* and did not consider factors now relevant to issuance of the writ. *See generally*, Note, *Supervisory and Advisory Mandamus Under The All Writs Act*, 86 HARV. L. REV. 595, esp. 598-99 and n. 18 (1973).

The Court of Appeals also points to *Ryan's* recognition of exceptions to the ban on criminal interlocutory appeals (29A), namely, cases where the custodian of the property sought is not himself the target of criminal inquiry. *E.g.*, *Perlman* v. *United States*, 247 U.S. 7 (1918). Of course the Foundation's position bears some resemblance to these custodians since it has possession of its contributors' names. The Court of Appeals mysteriously taxes us for not making "representations" as to this plain fact (29A). The point is that in addition to any similarity to such custodians, we assert our own First Amendment rights to privacy, freedom of association and the right to petition the courts for redress of grievances. While this makes our willingness to incur further sanctions for the purpose of obtaining appellate review more likely than that of third-party custodians, it also underscores the wastefulness of such a procedure because all the requisites for review are now present: (1) the absence of any evidentiary basis for the disclosure order; (2) an outstanding "order"; (3) the requisite degree of adversariness between the Foundation and the unions; (4) the appropriate factual context for applying First Amendment and other legal principles to the disclosure order. Presentation of these same requisites

on review of a contempt citation is the pursuit of form over substance.

Finally, the Court of Appeals virtually invites the Foundation to follow the NAACP into contempt or criminal conviction for the purpose of appellate review (30A). *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) (criminal contempt); *NAACP* v. *Button*, 371 U.S. 415 (1963) (conviction); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960) (conviction); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (civil contempt having the effect of foreclosing a hearing on the merits).* All four of these cases were decided prior to *Schlagenhauf;* all came to this Court on review of *state* court judgments and this Court neither decided nor adverted to any issue of mandamus. None of these cases addresses this Court's undoubted power to supervise *federal* courts by mandamus where, as here, First Amendment rights are in imminent peril. By some alchemy, however, the Court of Appeals converts the NAACP's unfortunate necessity to incur criminal liability or civil contempt into a reason for imposing the same status on the Foundation. Such a cumbersome—indeed retrograde—procedure is neither efficient nor appropriate for enlightened federal practice.

Furthermore, the District Court is under no obligation to find the Foundation in criminal contempt or to impose some other final disposition such as a default judgment under Fed. R. Civ. P. 37.** Civil contempt is of course unappealable. *Fox* v. *Capital Co.*, 299 U.S. 105 (1936). As

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* The Court of Appeals mistakenly describes the contempt in *NAACP* v. *Alabama, supra,* as criminal (30A).

** In fact, the District Court has twice refused certification under 28 U.S.C. §1292(b), so that no interlocutory appeal could be taken from denial of our motion to dismiss the complaint nor from the disclosure order (see p. 7, *supra*).

noted by the petitioner in *Schlagenhauf*, "the right to appeal is in effect dependent upon the consent of the district court, which can, instead of ordering dismissal or default, enter some non-appealable order, such as a stay or an order precluding introduction of certain evidence or support or defense of certain claims." Brief for Petitioner at 21, *Schlagenhauf* v. *Holder, supra.* In short, the Court of Appeals may well be remitting the Foundation to an illusory search for finality in the District Court with the foreseeable result of another petition for writ of mandamus. There is no justification for this waste of judicial resources.

C. The Disclosure Order Conflicts With the Settled Principles of *NAACP* v. *Alabama* and *NAACP* v. *Button* and Construes the "Interested Employer" Proviso of the Landrum-Griffin Act as Requiring Impairment of First Amendment Rights

The District Court's disclosure order premised upon §101(a)(4) violates Foundation contributors' First Amendment rights to privacy and freedom of association in their support of a bona fide, charitable tax-exempt legal aid organization. Disclosure of contributors' names nullifies First Amendment rights "at the very moment of [their] assertion." *NAACP* v. *Alabama,* 357 U.S. 449, 459 (1958). The District Court's disclosure order flatly contravenes settled principles, as applicable to the federal government as the states, concerning rights of freedom of association and privacy. In holding that Alabama could not constitutionally compel disclosure of membership lists of the National Association for the Advancement of Colored People which had *inter alia* furnished financial support and legal assistance to blacks, a unanimous Court stated:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech.
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> ... This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. ... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama, supra,* 357 U.S. at 460, 462. (Citations omitted.)

Foundation contributors, like Alabama contributors to the NAACP, have the common purpose of assisting an unpopular minority, namely workers suing their employers and unions. This purpose will, it is fair to say, be gravely impaired by disclosure of their names and amounts of contributions.* First Amendment rights do not disappear merely because, as here, it is alleged that such contributions were made by "interested employer[s]." Even criminal allegations of misconduct are not sufficient to penetrate

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* *E.g., see* reports of union violence against non-union sympathizers and facilities. Philadelphia Evening Bulletin, July 15, 1974, at 1, col. 3; Washington Post, March 2, 1974, at E38, col. 1; Kansas City, Mo. Star, Sept. 30, 1973, at 8A, col. 1.

the shield of the First Amendment.* *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.) (3-judge court), *aff'd per curiam*, 393 U.S. 14 (1968); *see also*, *Eastland* v. *United States Servicemen's Fund*, 488 F.2d 1252 (D.C. Cir. 1973), *cert. granted*, 419 U.S. 823 (1974) (No. 73-1923); *United States* v. *Biscelgia*, 43 U.S.L.W. 4242 (U.S. Feb. 19, 1975). It follows that civil allegations of statutory violations are, by themselves, insufficient to vitiate First Amendment protections.**

The unions prevailed on the Court of Appeals to accept their view that a more fully developed factual record is a prerequisite to consideration of our constitutional challenge of the District Court's construction of the Landrum-Griffin Act. Yet it is precisely this lack of factual record that renders the District Court's order unconstitutional.

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* First Amendment rights of *group* privacy and freedom of association, which necessarily involve disclosure of identities to a group or its representative, differ fundamentally, therefore, from the Fifth Amendment *individual* privilege against self-incrimination which has been held inapplicable to incriminating documents in the hands of non-party accountants and banks. *See Couch* v. *United States*, 409 U.S. 322 (1973); *United States* v. *Bank of Commerce*, 405 F.2d 931 (3 Cir. 1969).

** Nor can the disclosure of political contributions mandated by the Federal Election Campaign Act of 1971 ("FECA"), 86 Stat. 3, 47 U.S.C. §801 *et seq.* and 2 U.S.C. §431 *et seq.*, be analogized to Foundation contributions. Bona fide non-political private organizations "dealing with national policy" under First Amendment aegis are not subject to FECA disclosure requirements. *United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1142 (2 Cir. 1972); *American Civil Liberties Union, Inc.* v. *Jennings*, 366 F. Supp. 1041, 1054-57 (D.D.C. 1973) (3-judge court), *prob. juris. noted sub nom., Staats* v. *American Civil Liberties Union, Inc.*, 417 U.S. 944 (1974) (No. 73-1413).

Assuming *arguendo* that at some point the contributors' First Amendment rights yield to the unions' demands for disclosure, the District Court was manifestly premature in requiring disclosure when other less disruptive constitutional avenues of discovery remain available, such as depositions of Foundation-supported plaintiffs and their employers and examination of publicly identified members of the Foundation's Advisory Council who might be asked if they know of contributions to the Foundation by any employer.* For the unions now to insist that a fuller factual record is necessary merely reinforces our point that the District Court unconstitutionally construed §101(a)(4) as requiring disclosure without an evidentiary predicate. Unlike the two cases cited by the Court of Appeals** (24A)—where precipitate trial court action prematurely tendered constitutional issues for decision prior to a full trial in which they might be irrelevant or at any event *preserved*—the District Court's order perforce squarely presents the constitutional issue in a context where compliance will forever decide First Amendment rights which are incapable of preservation during or after trial.

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* *Baker* v. *F & F Investment*, 470 F.2d 778 (2 Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (disclosure of confidential news sources denied because plaintiff made no effort to exhaust other available sources of information); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *petition for cert. dismissed*, 417 U.S. 938 (1974) (disclosure of confidential news sources ordered *after* plaintiff demonstrated that he had exhausted all other practical sources of the information); *Garland* v. *Torre*, 259 F.2d 545 (2 Cir.), *cert. denied*, 358 U.S. 910 (1958) (same as *Carey* v. *Hume*, *supra*). In addition, the District Court below in another action denied a request for disclosure of confidential news sources where no demonstration had been made that other means had been exhausted. *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973) (Richey, J.).

** *Askew* v. *Hargrave*, 401 U.S. 476 (1971); *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U.S. 194 (1934).

The very purpose of privacy and freedom of association is to permit joint activity free of unwarranted governmental intrusion and forced disclosure. Revealing the contributors' names will expose them to reprisals* from those wishing to discourage such contributions, with the consequence that the Foundation—and the workers it assists—will face significant diminution of financial support. Once contributors' names are revealed and the amounts of their contributions disclosed to the unions,** subsequent judicial action will be ineffectual. *See, e.g., Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487, 490 (7 Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348, *rehearing denied*, 401 U.S. 950 (1971).

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* People who do not support unions reportedly have been victimized by union personnel. *E.g., Richardson* v. *Communications Workers of America*, 443 F.2d 974, 983-84 n.12 (8 Cir. 1971); Wall St. J., July 15, 1971, at 4, col. 1; C. Stevenson, *Labor Violence —A National Scandal*, Reader's Digest at 153 (Aug. 1973).

** The disclosure order offers vague and inadequate protection by providing that contributors' names and contributions "not be made public and that plaintiffs' counsel make known such employer identities only to particular persons whose assistance is required for the investigation of the contributing employers' interest and activities" (10A). The "employers' interests and activities" subject to "investigation" are synonymous with plaintiff-directed *carte blanche* inquiry, namely, (a) "whether the employers are in the same 'line of business' as the unions against whom they are financing litigation"; (b) the "employers' relationships with the unions against whom they are financing litigation through the Foundation"; (c) "whether contributing employers have a stake in the legal propositions being advanced in the suits against the unions which they are financing"; (d) "whether the same contributing employers are also financing the defendant Committee's efforts, which include direct anti-union lobbying and persuader activities"; and (e) "other anti-union conduct of the contributing employers, which will bear upon their 'interest' in contributing to the litigations against unions financed and managed by the defendant Foundation" (Plaintiffs' Memorandum Supporting Motion to Compel Answers to Interrogatories, served January 18, 1974, at 4-5).

As a legal aid organization, the Foundation is constitutionally no different from the NAACP Legal Defense and Educational Fund ("LDF") or the American Civil Liberties Union ("ACLU"). As such, the Foundation enjoys the First Amendment right to aid those petitioning for the redress of grievances through the courts. The District Court's order would force disclosure of contributing employers to all such organizations where they aid workers who assert constitutional or other legal claims against unions.* The unions themselves assert that the NAACP and the ACLU would run afoul of §101(a)(4) if they undertook a "special program"—an undefined term that could mean one lawsuit—of financing litigation against unions by their members (1st Br. Opp. 22-23, n. 11). In construing the "interested employer" proviso to reach the Foundation's constitutionally protected activities, the District Court rendered the statute constitutionally infirm and violated the principle that "groups can unite to assert their legal rights as effectively and economically as practicable." *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 580 (1971).

In *United Transportation Union*, this Court summarized the constitutional doctrine first enunciated in *NAACP* v. *Button*, 371 U.S. 415 (1963), where it held that the First Amendment, as here, protects the group right of providing free legal assistance in litigation. This Court stated:

> "The common thread running through our decisions in *NAACP* v. *Button* [371 U.S. 415 (1963)], *Trainmen* [*Bhd. of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964)] and *United Mine Workers*

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* *See, e.g.*, LDF-supported cases, *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236 (5 Cir. 1971); *Rock* v. *Norfolk & Western Ry.*, 473 F.2d 1344 (4 Cir.), *cert. denied*, 412 U.S. 933 (1973).

> [*United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967)], is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." *United Transportation Union* v. *State Bar of Michigan, supra,* 401 U.S. at 585-86.

Disclosure of contributors' names threatens the Foundation's very existence as a financially independent source of legal assistance to deserving workers throughout the country. The nationwide scope of Foundation-supported litigation and the disclosure order's effect on federal labor policy and constitutional doctrine underscore the need for review in this Court.

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari and mandamus should be granted and the disclosure order of the District Court for the District of Columbia reversed.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

THOMAS S. JACKSON
1828 L Street, N.W.
Washington, D. C. 20036
(202) 466-8850

JOHN L. KILCULLEN
1747 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
(202) 785-9500

REX H. REED
8316 Arlington Boulevard
Fairfax, Virginia 22030
(703) 573-7010

CONRAD K. HARPER
DEBORAH E. LYNCH
Simpson Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel.

April 21, 1975

Opinion of Charles R. Richey, *U.S.D.J.*,
Filed June 5, 1974

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Plaintiffs,

—v.—

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,

Defendants.

APPEARANCES:

For the Plaintiffs:

JOSEPH L. RAUH, JR., Esquire
JOHN SILARD, Esquire
ELLIOTT C. LICHTMAN, Esquire
Washington, D.C.

For the Defendants:

JOHN L. KILCULLEN, Esquire
REX H. REED, Esquire
THOMAS S. JACKSON, Esquire
Washington, D.C.

WHITNEY NORTH SEYMOUR, Esquire
CONRAD K. HARPER, Esquire
DEBORAH E. LYNCH, Esquire
New York, New York

MEMORANDUM OPINION

Once again this case is before the Court, in this instance on Plaintiff's Motion to Compel Answers to Interrogatories. After careful consideration of the memoranda filed in support of and in opposition to that motion, and the able oral argument of counsel, the Court has decided to grant Plaintiffs' Motion by Order of even date herewith. However, the matter does not end there. In their memoranda filed with the Court, the parties present divergent opinions as to the applicability of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 522, 29 U.S.C. §411(a)(4), which prohibits "interested employer" financing of employee lawsuits against unions and confers a statutory right of action upon unions to protect themselves from employer interference within the scope of Section 101(a)(4). See this Court's Memorandum Opinion in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.* v. *National Right to Work*, 366 F.Supp. 46 (D.D.C. 1974). The statutory prohibition giving rise to a union right of action states in pertinent part:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency • • • provided • • • that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."

Defendants contend that the proviso restricts so-called interested employer financing *only* of those employee lawsuits wherein a worker brings a complaint against his or

her union showing a violation of rights guaranteed by Section 101(a)-(b) of Title I of the Act. Plaintiffs argue that the plain meaning of the statute does *not* confine the Section 101(a)(4) proviso to suits against unions which assert Title I violations; rather, Congress intended the Section to apply to any judicial, administrative, or other proceeding brought by a member against his or her union regardless of the nature of the cause of action asserted. For the reasons set forth below, the Court has determined that the proviso's limitation on interested employer financing encompasses every employee suit against his own union and, therefore, we must reject the defendant's proposed restriction of the proviso's prohibition to suits claiming Title I violations.

We start with the language of Section 101(a)(4) itself which is unambiguous. The Section applies without qualification to "an action in any court, or in a proceeding before any administrative agency." The proviso, which follows, restrains interested employers from financing "any *such action,* proceeding, appearance, or petition" and clearly refers to "an action • • • or • • • proceeding" discussed in the primary clause of the section. There is nothing in the statutory language just mentioned to suggest that operation of Section 101(a)(4) with its proviso is somehow confined to Title I lawsuits. As the Court noted in its original memorandum Opinion in this case, "(w)here Congressional intent is clear in the language of the statute, there is no need to resort to general rules of statutory construction or legislative history in order to construe the provision in issue. • • • " *International U., U.A., A. & A.I.W.* v. *National Right to Work,* 366 F. Supp. at 48.

There are several decisions by appellate courts indicating that Section 101(a)(4) of the Act has application above and beyond suits or proceedings invoking Title I rights. The

United States Court of Appeals for this Circuit in *Roberts v. N.L.R.B.*, 350 F.2d 427 (D.C. Cir. 1965), considered Section 101(a)(4) of the Act in determining, in part, whether an order of the National Labor Relations Board, finding that the petitioner Union had engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the National Labor Relations Act[1] by fining a member because he had filed unfair labor practice charges with the Board, was invalid because the member failed to first pursue reasonable hearing procedures within the union. The Labor-Management Reporting and Disclosure Act came into play in this action because Section 101(a)(4) of the Act provides, where practicable, for a union member's exhaustion of the union's complaint procedures before turning to the Board or another forum for relief. Thus, the *first* proviso of Section 101(a)(4) which directly precedes the interested employer prohibition, states:

> "[t]hat any such member may be required to exhaust *reasonable hearing procedures* (but not to exceed a four-month lapse of time) *within such organization, before instituting legal* or administrative proceedings against such organization or any officer thereof • • •"

In its application of the above limitation on a worker's right to sue to the Board's Order premised upon Section 8(b)(1)(A) of the NLRA, the Court of Appeals determined that the operation of Section 101(a)(4) of the LMRDA did not in any way preclude the Board's ultimate exercise of its traditional powers under the NLRA to protect individuals from coercion by labor organizations, *but,*

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[1] 29 U.S.C. §158(b)(1)(A).

> "*The proviso does authorize indeed it may require,* the agency or court to which the member comes for relief to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted—in deference to the Congressional desire that a solution be reached by means other than at the hands of public authorities." 350 F.2d at 430. (Emphasis added)

The Court of Appeals' consideration and application of Section 101(a)(4) and the statutory limitations thereupon in its review of proceedings before the Labor Relations Board leaves no doubt that the Section applies beyond the area of suits and proceedings asserting Title I rights under the LMRDA.

The Court's conclusion in this regard is further buttressed by the recent decision by the Supreme Court in *N.L.R.B.* v. *Industrial Union of Marine & Ship Workers,* 391 U.S. 418, 88 S.Ct. 1717 (1968), a case involving an exhaustion of internal union procedures issue similar to that in *Roberts, supra.* The issue presented was "whether consistent with the applicable federal statutes (the NLRA and LMRDA) a union may penalize one of its members for seeking the aid of the Board without exhausting all internal union remedies." 88 S.Ct. at 1720. The Court noted that the constitution of the union charged with an unfair labor practice provided that a member could be expelled for filing a charge with the Board without first having exhausted "all remedies and appeals within the Union." 88 S.Ct. at 1721. With respect to such internal procedures, Section 8(b)(1)(A) of the NLRA preserves to a union "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C.A. §158(b)(1)(A). Notwithstanding this restraint on

judicial interference with a union's regulation of its internal affairs, the Court found that where union rules penalize members for filing unfair labor practice charges with the Board, other considerations of public policy are operative and must be effectuated. 88 S.Ct. at 1721.

However, the exhaustion of internal procedures requirement of Section 101(a)(4) of the LMRDA raised a further question as to the propriety of the Board action. The Court, in reviewing the relevancy of the first proviso to Section 101(a)(4) and commenting upon its applicability to unfair labor practice charges before the Labor Relations Board, held that the proviso did not bar a dissident worker's access to the Board and, ultimately, the courts, where his grievance could be reviewed and the public policy issues fully aired. The Court concluded that the wording "may be required" in the proviso,

> "is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency. * * * We conclude that unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did not consume more than four months of time, but that a court or agency might consider whether a particular procedure was "reasonable" and entertain the complaint even though those procedures had not been "exhausted". 88 S.Ct. at 1723-24.

Similarly, this Court reads the second proviso to Section 101(a)(4) of the Act "as installing in this labor field" a principle that interested employers must stay their hands from contributing to employee suits against their unions regardless of the type of claims asserted therein.

Defendants also argue that where an action is properly brought by a union member against his union premised upon a non-Title I claim, "interested employer" financing is not precluded by Section 101(a)(4) of the Act because such preclusion would limit a union member's rights in violation of Section 103 of the Act. 29 U.S.C. §413. Section 103 provides:

> "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and by-laws of labor organization."

Defendants contend that were the Court to apply Section 101(a)(4) beyond the area of Title I suits, for example, to NLRB proceedings,[2] it would be "limiting" the union member's right to sue in derogation of Section 103[3]

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[2] *N.L.R.B.* v. *Industrial Union of Marine & Ship Workers*, 391 U.S. 418, 88 S.Ct. 1717 (1968); *Roberts* v. *N.L.R.B.*, *supra*.

[3] In support of this proposition, defendants rely on the recent decision by the Court of Appeals for the Seventh Circuit in *Adamzewski* v. *Local 1487, Machinists*, 73 CCH Lab. Cas. ¶14,463 (7th Cir. 1974). In that case, the Court found that the suit was financed by "interested employers" and on that basis dismissed a claim for injunctive relief arising under Section 101(a)(5) of the LMRDA. The Court chose not to dismiss an additional cause of action brought pursuant to Section 301 of the NLRA, 29 U.S.C. §185, on similar grounds in light of the so-called savings provision, Section 413, set forth in the text above. Instead, after finding that the employees who had brought the suit were "not • • • precluded by (Section 101(a)(4)) from pursuing any other remedies properly brought," the Court went on to dismiss the additional claim on a separate ground. 73 CCH Lab. Cas. ¶14,463 at 29,481. Defendants argue on the basis of *Adamzewski* that a claim "prop-

Defendants misconceive the import of Section 103, which is intended generally to preserve employee rights of action under the NLRA. It does not preserve a pre-existing right to employer financing since obviously employers are under no such obligation. At best, a dissident and litigious worker has a right to accept his employer's financial support, just as he is entitled to accept a loan from his bank or neighbor. However, it is the responsibility of this Court in implementing the mandate of the LMRDA to apply the statutory ban on "interested employer" contributions to employee suits against unions. The result is not an infringement on an employee's right to sue his union, but a limitation on what monies can finance the suit. The decision to restrain employer financing of employee lawsuits against unions was made by Congress through the enactment of Section 101 (a)(4) and the LMRDA, and the Court intends to implement this Congressional mandate where appropriate.

In view of the foregoing reasons, the statutory ban on "interested employer" financing extends beyond suits or proceedings arising under Section 101(a)-(b) of Title I of the LMRDA.

/s/ CHARLES R. RICHEY
CHARLES R. RICHEY
United States District Judge

Date June 5, 1974

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erly brought" under a statute other than Title I of the LMRDA may be financed by interested employers. Defendants' application of such a holding on the part of the Seventh Circuit is simply erroneous. *Adamzewski* stands for the proposition that the determination that an interested employer has financed a suit arising under the NLRA or the Railway Labor Act, 45 U.S.C. §151-188, is not a basis for dismissal. We find no suggestion in *Adamzewski* that such a case may continue on its merits nourished by interested employer financing. The Court did not need to reach that question since it dismissed the matter in all respects. It is this Court's opinion that such financing could have been restricted pursuant to Section 101(a)(4), notwithstanding the progression of the suit on its merits.

Order of Charles R. Richey, *U.S.D.J.*, Directing Disclosure, Filed June 5, 1974

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCALS 1093, 558, and 25, *et al.*,

Plaintiffs,

—v.—

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,

and

NATIONAL RIGHT TO WORK COMMITTEE,

Defendants.

ORDER

Upon consideration of Plaintiffs' Motion to Compel Answers to Interrogatories, the memoranda filed in support of and in opposition thereto and the able argument of counsel, and it appearing to the Court that the information Plaintiffs seek goes to the heart of this litigation, and it further appearing that Plaintiffs have demonstrated good cause for obtaining the necessary information, it is

ORDERED this 5th day of June, 1974, that Plaintiffs' Motion to Compel Answers to Interrogatories is granted, and that Defendants are required to provide Plaintiffs within fifteen days hereof with answers to interrogatories or portions of interrogatories as follows:

1. The first sentence of Interrogatory No. 3 in "Set No. II of Interrogatories by Plaintiffs to Defendants."

2. Interrogatory No. 1 in "Set No. II of Interrogatories by Plaintiffs to Defendants", requesting identification of certain donors to the Defendant Foundation, but only to the extent of identifying,

   (a) the 37 donors who made the donations identified in the answers by Defendants to interrogatories 2(b)(ii) and 2(b)(ii) [*sic*, should be 2(b)(ii) and 2(b)(iii)],

and

   (b) 37 of the donors among the 1048 donations identified in the answer by Defendants to interrogatory 2(b)(iv), the 37 to be the first or last 37 on the alphabetized donor list.

AND IT IS FURTHER ORDERED that the employer identities disclosed to Plaintiffs by Defendants' answers compelled by this Order not be made public and that Plaintiffs' counsel make known such employer identities only to particular persons whose assistance is required for the investigation of the contributing employers' interests and activities in the five specific respects recited in Plaintiffs' Memorandum Supporting Motion to Compel Answers to Interrogatories.

/s/ CHARLES R. RICHEY
CHARLES R. RICHEY
United States District Judge

Order of the District Court Denying Motion for Amendment and Modification of Order, Filed June 20, 1974

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

C.A. 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCALS 1093, 558 and 25, *et al.*,

Plaintiffs,

—v.—

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,

and

NATIONAL RIGHT TO WORK COMMITTEE,

Defendants.

ORDER

The Court has before it Defendants' Motion for Certification under 28 U.S.C. §1292(b) and Plaintiffs' opposition thereto. In their motion, Defendants ask the Court to amend its Order of June 5, 1974 compelling identification of names of contributors to defendant Right to Work Foundation so as to include a certification to the United States Court of Appeals for the District of Columbia Circuit pur-

suant to 28 U.S.C. §1292(b). Defendants contend that the Court's Order entered June 5, 1974 involves controlling questions of law as to which there are substantial grounds for differences of opinion, and that an immediate appeal from such Order will materially advance the ultimate termination of the instant litigation. The Court does not believe there are substantial grounds for differences of opinion respecting the aforementioned Court Order compelling identification of names of contributors. Accordingly, the standards of §1292(b) have not been met and Defendants' motion must be denied.

Contrary to Defendants' assertions, this Court has not ridden roughshod over Defendants' freedom of association or right to privacy. Furthermore, after careful consideration of the Memoranda filed in support of and in opposition to Plaintiffs' Motion to Compel Answers to Interrogatories, and based upon the record at the oral argument on Defendants' Motion in which all counsel argued in able and comprehensive fashion, the Court found in its June 5 Order that the information sought by plaintiffs "goes to the heart of this litigation" and that Plaintiffs had "demonstrated good cause for obtaining the necessary information." In addition, there is no other reasonable way for Plaintiffs to obtain the information sought in the subject interrogatories and discovery process.

In light of the Court's Findings and the recent decision of the Court of Appeals for this circuit in *Carey* v. *Hume*, No. 71-1736 (D.C. Cir. Jan. 28, 1974), it is clear that Plaintiffs are entitled to the material they seek, notwithstanding Defendants' assertion of First Amendment rights to withhold the information. See also *Garland* v. *Torre*, 259 F.2d 545 (2d Cir. 1958), cert. denied 358 U.S. 910 (1958); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972).

The criteria discussed by the Court of Appeals in *Carey* v. *Hume,* when applied to the facts of this case, compel granting Plaintiffs the discovery they desire. In light of the sensitivity of the information Plaintiffs seek through certain of their interrogatories, the Court earlier provided protection for the Defendants and their contributing employers by strictly limiting the use to which Plaintiffs' counsel may put the names they discover. As a matter of law, the Defendants are entitled to no more.

Where a decision such as that of the Court of Appeals in *Carey* v. *Hume* so clearly controls the discovery questions raised in a party's motion to compel answers to interrogatories, it cannot be said that there exists a "substantial ground for difference of opinion" warranting a stay of the proceedings and certification of the issues to the Court of Appeals. Indeed, stopping the case in its present posture would be contrary to the interests of justice in effecting a timely and proper termination of this litigation.

Accordingly, for all the above reasons, it is by the Court this 20th day of June,

ORDERED that Defendants' Motion for Amendment and Modification of its Order compelling Discovery entered June 5, 1974 to Provide for Certification under 28 U.S.C. §1292(b) to the Court of Appeals be and the same is hereby denied; and it is

FURTHER ORDERED that the Court's Order entered June 5, 1974 be stayed for a period of 5 days from the date hereof in which time Defendants may seek appellate review of the ruling therein.

/s/ CHARLES R. RICHEY
CHARLES R. RICHEY
United States District Judge

Order of the United States Court of Appeals Dismissing Appeal, Filed June 28, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civ. No. 839-73

No. 74-1660

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCALS 1093, 558 and 25, *et al.*,

—v.—

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,
Appellants.

Before:

LEVENTHAL, MACKINNON and WILKEY,
Circuit Judges.

ORDER

On consideration of appellants' motion for supersedeas and stay, and this Court not having jurisdiction over the order of the District Court appealed from, it is

ORDERED by the Court that appellants' aforesaid motion is denied and this appeal is dismissed.

Per Curiam

Order of the United States Court of Appeals Staying Order Pending Further Order, Filed June 28, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

No. 74-1661

NATIONAL RIGHT TO LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., and NATIONAL RIGHT TO WORK COMMITTEE,

Petitioners,

—v.—

HONORABLE CHARLES R. RICHEY, District Judge, United States District Court for the District of Columbia,

Respondent.

Before:

LEVENTHAL, MACKINNON and WILKEY,

Circuit Judges.

ORDER

On consideration of the petition for writ of mandamus and for stay, it is

ORDERED by the Court that responses shall be filed to the aforesaid petition on or before July 8, 1974, and, it is

FURTHER ORDERED by the Court that the order of the District Court entered June 5, 1974, is stayed pending further order of this Court to afford this Court an opportunity to consider the petition for writ of mandamus and the responses thereto.

Per Curiam

Circuit Judge MacKinnon would deny the motion for stay.

Opinion and Order of the United States Court of Appeals Denying Writ of Mandamus, Filed March 17, 1975

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1661

NATIONAL RIGHT TO WORK LEGAL DEFENSE and EDUCATION FOUNDATION, INC., and NATIONAL RIGHT TO WORK COMMITTEE,

Petitioners,

—v.—

HONORABLE CHARLES R. RICHEY, District Judge, United States District Court for the District of Columbia,

Respondent.

ON PETITION FOR WRIT OF MANDAMUS

Decided March 17, 1975

CONRAD K. HARPER for petitioners. THOMAS S. JACKSON and JOHN L. KILCULLEN entered appearances for petitioners.

JOSEPH L. RAUH, JR., for respondent.

Before McGOWAN, TAMM and ROBINSON, *Circuit Judges.*

Per Curiam: On May 1, 1973, respondents to this petition for mandamus—ten international unions and their af-

filiates—brought suit in the District Court against the National Right To Work Committee, and the National Right to Work Legal Defense and Education Foundation, Inc. (a separate organization affiliated with the Committee). The first cause of action sought declaratory and injunctive relief[1] in respect of alleged violations of Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959.[2] Defendants moved to dismiss because (1) there was no allegation that the employers contributing to the Foundation are employers of the employees supported by it, and (2) the Act does not confer on plaintiffs a right to enforce, through an independent action under Section 102, the provisions of Section 101(a)(4). On October 24, 1973, the District Court denied the motion to dismiss, ruling against the jurisdictional claim,[3] but reserving the deter-

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[1] A claim was also made for compensatory and exemplary damages. A second cause of action was for declaratory judgment and injunction to force defendants to file reports under § 203(b)(1) of LMRDA, and for exemplary damages. In the petition for mandamus now before us, defendants ask only vacation of a discovery order and dismissal of the first cause of action. Insofar as our decision on the discovery order does not in this case depend on its relation (if any) to the second cause of action, the content or status of the second cause of action is of no present relevance.

[2] 29 U.S.C. § 411(a)(4). That statute, which generally protects the right of a union member to institute legal proceedings against the union or its officers, contains a proviso that "no interested employer or employer association shall directly or indirectly finance . . ." any such proceeding.

Section 102 (29 U.S.C. § 412) provides that any person whose rights have been infringed in this respect may sue in the federal district court for appropriate relief.

[3] In addition to finding jurisdiction as to the first cause under Section 102, the district judge found that he had jurisdiction over the second cause under 28 U.S.C. § 1331(a), and implied that jurisdiction under that section would also be available for the first cause. *See* 366 F.Supp. 46, 48 n.1 (D.D.C. 1974). Jurisdiction over the second cause under Section 1331(a) is not challenged here.

mination of whether defendants had received contributions from "interested employers" until further evidence should be adduced. 366 F.Supp. 46 (D.D.C. 1974). The District Court thereafter denied defendants' request for certification of an interlocutory appeal under 18 U.S.C. §1292(b).

Plaintiffs sought to discover the names of all business contributors to the Foundation in 1972. When this was resisted on constitutional grounds, plaintiffs narrowed their request, and filed a motion to compel disclosure.[4] Defendants resisted in a series of memoranda in which they raised a number of statutory and constitutional issues, not all of which were strictly relevant to the discovery motion, and not all of which are repeated here. On June 5, 1974, the District Court granted the motion to compel disclosure, and on June 20 it denied certification of certain issues under 28 U.S.C. 1292(b), staying its order of June 5 until June 25 to allow defendants time to seek review in this court. On June 27, 1974, defendants filed an appeal and motion for stay in this court. The appeal was dismissed on June 28 for lack of jurisdiction, and certiorari was denied by the Supreme Court on January 27, 1975. The petition for mandamus and stay was filed on June 28, 1974 and on that same date this court stayed the District Court's order pending decision on the petition.[5]

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[4] The revised request sought the amounts contributed to the Foundation by the 116 persons listed as on its business advisory committee, the names of the 37 companies who gave more than $500 in 1972, and the names of 37 companies drawn at random from those contributing between $100 and $500 in 1972.

[5] At the same time the court directed that responses to the mandamus petition be filed by July 8. Mandamus matters are handled within the context of the motions procedures of this court, which differ significantly from those applicable to direct appeals. Over and above the time normally required for a preliminary examination of a matter of this consequence, there was an inordinate, albeit inadvertent, delay in scheduling the matter for hearing.

The petition asks this court to (1) vacate the order compelling discovery, and (2) dismiss the first cause of action (a) for lack of jurisdiction over the subject matter, or (b) because of the asserted unconstitutionality of the second proviso to Section 101(a)(4). It would appear that this court is being asked to rule on the following questions:

(1) Does Section 102 give the District Court jurisdiction to entertain a suit by a union to enforce the provisions of Section 101(a)(4)? [In his decisions of October 24, 1973 and June 5, 1974, the district judge ruled that it did.]

(2) Would a prohibition on financial contributions to the Foundation violate the First Amendment rights of employer-contributors?

(3) Is the definition of "interested employer" restricted to the immediate employer of union-member parties? [The district judge does not appear to have made a final ruling on the definition of "interested employer," but he implicitly held that it is something broader than the immediate employer.]

(4) Do the restrictions of Section 101(a)(4) apply only to suits brought by union members to protect rights under Title I of the Act? [The district judge ruled on June 5 that Section 101(a)(4) applies to more than Title I suits.]

(5) Was the order compelling disclosure either appropriate or constitutional? [On June 5, 1974 the District Court found that the information sought "goes to the heart of this litigation" and that plaintiffs had "demonstrated good cause for obtaining the necessary information." On June 20, he found that "there is no

other reasonable way for Plaintiffs to obtain the information sought in the subject interrogatories and discovery process," and stated that "in light of the Court's findings and the recent decision of the Court of Appeals for this Circuit in Carey v. Hume, [492 F.2d 631 (1974), *cert. dis.* 417 U.S. 938 (1974)], it is clear that Plaintiffs are entitled to the material they seek, notwithstanding Defendants' assertion of First Amendment rights to withhold the information."]

The Supreme Court in the recent past has on occasion unmistakably enlarged the area in which mandamus may be suitably employed.* It is equally clear, however, that mandamus remains, in that Court's contemplation, an extraordinary remedy, to be used in the discretion of the issuing court only where essential in the interest of justice, and not in derogation of the orderly processes of appeal. The issue that we must decide is whether mandamus is appropriate in the instant case. For the reasons stated below, we hold that mandamus is neither necessary nor appropriate.

This court has several times in recent years spoken to the principles governing the issuance of the writ. *See, e.g., Colonial Times, Inc.* v. *Gasch,* No. 74-1349 (Jan. 3, 1975); *Donnelly* v. *Parker,* 486 F.2d 402 (1973); *Morrow* v. *District of Columbia,* 417 F.2d 728 (1969). We do not repeat those discussions here, but, taking them into account, demonstrate why none of the five alleged trial court errors are appropriate for resolution by mandamus.

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* *See* Will v. United States, 389 U.S. 90 (1967); Schlagenhauf v. Holder, 379 U.S. 104 (1964); La Buy v. Howes Leather Co., 352 U.S. 249 (1957). *See generally,* Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 Harv. L. Rev. 595 (1973).

1. *Jurisdiction Under Section 102.*

Petitioners allege that the District Court erred in refusing to rule that plaintiffs could not maintain this action as an affirmative suit. As the Seventh Circuit recognized in *International Brotherhood of Electrical Workers, Local 336* v. *Illinois Bell Telephone Company*, 496 F.2d 1, 3 (7th Cir. 1974), the instant case is the first to address this point, and the issue is not an easy one. Even if the district judge's finding of jurisdiction should ultimately be held to be erroneous, his determination that jurisdiction does exist is not the clear usurpation of judicial power traditionally required for the issuance of mandamus.[1] As the Supreme Court said in *Ex parte Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 275 (1921):

> There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction the writ will ordinarily be granted. . . . If, however, the jurisdiction of the lower court is doubtful, *Ex parte Muir*, 254 U.S. 522 . . . or if the complaining party has an adequate remedy by appeal or otherwise, *Ex parte Tiffany*, 252 U.S. 32, 37; *Ex parte Harding*, 219 U.S. 363; the writ will ordinarily be denied.

Nor is this a case such as *Ex parte Crane*, 30 U.S. (5 Pet.) 190 (1831) or *Maryland* v. *Soper*, 290 U.S. 9 (1925), in which denial of mandamus will reduce or eliminate effective ap-

[1] Nor is it clear that a contrary ruling would divest him of jurisdiction. *See* note 3 *supra*.

pellate scrutiny. It is unquestioned that review of the jurisdiction question will be fully available on appeal from a final judgment. *See Ex parte Chicago, R.I. & Pac. Ry., supra, In re Atlantic City RR,* 164 U.S. 633 (1897). *See also Ex parte Fahey,* 332 U.S. 258 (1947).

The district judge's decision on the Section 102 question does not show any persistent or deliberate disregard of limiting rules such as might bring the case within the ambit of "supervisory" mandamus. *See Will* v. *United States,* 389 U.S. 90 (1967); *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); *McCullough* v. *Cosgrave,* 309 U.S. 654 (1940); *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U.S. 701 (1927).

Although "advisory" mandamus, which may issue to clarify novel and important questions of law, might seem relevant, the cases on that subject authorize such mandamus only where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible, as, for example, where the district judges are in error, doubt, or conflict on the meaning of a rule of procedure. *See Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *Colonial Times Inc.* v. *Gasch, supra; United States* v. *Hughes,* 413 F.2d 1244 (5th Cir. 1969). *Vacated as moot,* 397 U.S. 93 (1970). This is not such a case.

Finally, it cannot be said that mandamus is appropriate here for any weighty equitable reason, such as interference with foreign policy, *Ex Parte Peru,* 318 U.S. 578, 587 (1943); the possibility that the question will for practical rather than legal reasons evade review, *Cf. Perlman* v. *United States,* 247 U.S. 7 (1918); interference with basic principles of federalism, *Maryland* v. *Soper,* 270 U.S. 9, 29-30 (1925); interference with and irreparable injury to a

clear congressional plan, *United States Alkali Export Ass'n.* v. *United States,* 325 U.S. 196, 203-204 (1945); or unnecessary and unseemly interference with a coordinate branch of government, *Nixon* v. *Sirica,* 487 F.2d 700, 707 n.21 (D.C. Cir. 1973).

The Section 102 jurisdictional question is clearly one that can be appropriately and adequately dealt with through the normal channels of appellate review. In the absence of a certification under 1292(b), which was denied here, this question must await final judgment and review under 28 U.S.C. 1291.

2. *The Constitutionality of Restricting Foundation Activities.*

The Foundation's argument on this question appears to rest on their assertion that they are a neutral group, not a front for "interested" employers, and that therefore they come within the protections afforded by *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964), and *United Mine Wrks.* v. *Illinois State Bar Ass'n.,* 389 U.S. 217 (1967).

We do not understand petitioners to argue that Congress may not prohibit direct financing by an interested employer through a sham or cover entity. Their argument rather must rest on their assertion that they are a neutral body, and the constitutional question they present thus cannot be decided without a determination of what type of organization the Foundation is in fact. Any review or determination of the constitutional issue must await development in the trial court of the factual context. *See Borden Co.* v. *Baldwin,* 293 U.S. 194 (1934); *Askew* v. *Hargrave,* 401 U.S. 476 (1971).

3. *The Definition of "Interested Employer".*

Petitioners argued to the District Court that "interested employer" means only the immediate employer of the union member whose suit is being financed. They asserted that a final definition in the abstract was necessary because, if petitioners' definition were accepted, alternative means of discovery—deposing the immedate employers in the various suits financed by the Foundation—would be required under *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dis.* 417 U.S. 938 (1974). Petitioners inform this court that "the term 'interested employer' in the proviso to § 101(a)(4) is not defined in the statute and has not been authoritatively interpreted by the courts." Petition at 13 n.16. In ordering discovery, the district judge implicitly ruled that there is a likelihood that "interested employer," when viewed in a fully developed factual context, may be something broader than the immediate employer of the suing union member. A definitive ruling on the proper interpretation was held, however, pending development of a factual context.

In so far as plaintiffs seem to assert that at least some immediate employers are involved (see Complaint para. 12), a mandamus compelling petitioners' interpretation would not strip the district court of jurisdiction. Even were such an allegation not present, possible error in the adoption of a "line of business" or "contract with the union" definition would not constitute clear error in asserting jurisdiction. *See Chicago, R.I. & Pac. Ry., supra.* Thus traditional mandamus is not appropriate. No deliberate avoidance of applicable rules or holdings is evident such as would justify supervisory mandamus—indeed, petitioners concede that this is a novel question. Petitioners rely principally on the concept of advisory mandamus in regard

to this question, arguing that it is novel, and that it is of extreme importance because it will determine whether the discovery—and consequent alleged First Amendment violations—goes forward in the manner ordered. The question is not, however, one likely of significant repetition prior to effective review, such as is required for advisory mandamus. Nor is there any compelling equitable reason, for, as will be discussed below, the discovery order may be reviewed in connection with a contempt citation, and that review will be able to address the argument that the order was unjustified because premised on an erroneous definition of "interested employer".

4. *The Scope of Section 101(a)(4).*

Petitioners further seek to have us rule that the restrictions of Section 101(a)(4) apply only to suits brought to protect rights granted by Title I of the Act. All of our analysis with regard to the supervisory, advisory, and equitable considerations of the Section 102 and "interested employer" claims apply here. In addition, plaintiffs informed us at oral argument that some of the Foundation-supported suits in fact involve Title I claims. Thus a ruling on this question, as with the "interested employer" question, would not remove jurisdiction from the District Court.

5. *The Discovery Order.*

The discovery order in question here is clearly within the district court's jurisdiction to entertain, *Carey* v. *Hume*, *supra*. It thus does not come within the "clear usurpation of judicial power" concept of traditional mandamus. Nor is there any showing, relevant to our supervisory function, that the district judge deliberately or persistently disobeyed any order or rule of this court, *see Will* v. *United States*,

supra, 389 U.S. at 100, *LaBuy* v. *Howes Leather Co., supra.* Indeed, the district judge stated his judgment to be that the order was properly entered under the principles identified in *Carey.*

Advisory mandamus is inappropriate, for *Carey* has set forth all of the "advice" necessary. As the Supreme Court stated in *Schlagenhauf* v. *Holder, supra,* 379 U.S. at 112:

> This is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the District Court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy. The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' Parr v. United States, 351 U.S. 513, 520; *see* Bankers Life & Casualty Co. v. Hollan, [346 U.S. 379] at 382.

Petitioners' best argument is that entry of the order will effectively deny adequate review because the harm feared —disclosure—will be irremediable. Petitioner cites for this proposition *Harper & Row Publishers, Inc.* v. *Decker,* 423 F.2d 487 (7th Cir.), *aff'd by an equally divided court,* 400 U.S. 348, *rehearing denied,* 401 U.S. 950 (1970); *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1970); *Hartley Pen Co.* v. *United States District Court,* 287 F.2d 324 (9th Cir. 1961), and *United States* v. *Hemphill,* 369 F.2d 539 (4th Cir. 1966).[8]

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[8] Three of these cases involved circumstances in which the party against whom the order was issued was not the party injured by disclosure and might not be expected to risk contempt to challenge the order (see discussion in text and note at note 6 *infra* [*sic*, should be *supra*]). In *Harper & Row,* the attorney-client privilege was involved, with the documents evidently in the con-

Subsequent to those cases, however, in *United States* v. *Ryan*, 402 U.S. 530 (1971), the Supreme Court strongly reaffirmed its decision in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), and *Alexander* v. *United States*, 201 U.S. 117 (1906), to the effect that a subpoena or order to disclose information is not a final order even though the resisting party must subject himself to contempt in order to obtain review under 28 U.S.C. 1291. In The Supreme Court in *United States* v. *Alexander, supra*, and this court in *United States* v. *Anderson*, 464 F.2d 1390 (D.C. Cir. 1972), this court recognized that this principle extends even to assertion of constitutional privilege.[*]

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trol of the attorneys; in *Metros*, the information was the name of an informer (disclosure being dangerous to the informer) which was in the knowledge of police officers; in *Hartley Pen*, the disclosure ordered was of a trade secret leased to the plaintiff (against whom the order was issued). In addition, in *Hartley Pen*, the court explained at length why it believed mere resistance to the order would be unlikely to ensure any sort of order that would be reviewable under the final judgment rule. Without ruling on the validity of the above determinations that mandamus might issue, we find that no such special circumstances exist here.

United States v. *Hemphill* involved clearly unnecessary embarrassment to a coordinate branch, a circumstance traditionally recognized as warranting special treatment, see *Nixon* v. *Sirica*, *supra*. The Fourth Circuit further stated, however: "We hold . . . that any litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful." 369 F.2d at 543. To the extent that this holding is in conflict with the subsequent Supreme Court decision in *Ryan*, we decline to follow it.

[*] *Footnote by petitioners' counsel, not the Court:* We believe this sentence should read as follows: "The Supreme Court in *United States* v. *Alexander, supra*, and this court in *United States* v. *Anderson*, 464 F.2d 1390 (D.C. Cir. 1972), recognized that this principle extends even to the assertion of constitutional privilege."

The holding in *Ryan* indicates (by an analogy approved by the Supreme Court, *see Roche* v. *Evaporated Milk Ass'n.*, *supra*, 319 U.S. at 30 (citing *Cobbledick* as providing guidance for mandamus)) that mandamus is neither necessary nor appropriate in the instant case, since the order may be challenged through disobedience. *Ryan* further noted that "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle." 402 U.S. at 533, citing *DiBella* v. *United States*, 369 U.S. 121 (162) (reviewing a denial of a motion for return of seized property where there was no criminal prosecution pending against the movant), and *Perlman* v. *United States*, 247 U.S. 7 (1918) (where the custodian of the property to be produced was the court clerk, who "could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." *Ryan, supra*, 402 U.S. at 533).

It is possible that there may arise situations involving certain types of third party custodians or other persons who cannot be expected to risk contempt, such as would justify mandamus.[9] Petitioners, however, have made no representations to us, in their papers or at oral argument, that they are circumstanced as was the court clerk in *Perlman*.

In the instant case, petitioners have repeatedly stressed to this court that they are extremely close in principle to

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[9] This may be the underlying question, as to which we intimate no opinion, in the current split of authority on whether disclosure in alleged violation of the attorney-client privilege may be reviewed on mandamus. *Compare* Harper & Row Publ. Inc. v. Decker, *supra*, *with* International Business Machine Corp. v. United States, 480 F.2d 293 (2d Cir. 1973). *See also* discussion in note 8 *supra*.

the interests successfully asserted in *N.A.A.C.P.* v. *Button*, and that they relate to their contributors as the N.A.A.C.P. does to its members. We note further that the N.A.A.C.P. was repeatedly willing to subject itself to the risk of either criminal conviction or criminal contempt in order to challenge various orders compelling it to disclose its membership lists. *See Gibson* v. *Florida Legislative Committee*, 372 U.S. 539 (1963) (criminal contempt); *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963) (conviction); *Bates* v. *Little Rock*, 361 U.S. 516 (1960) (conviction); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958) (criminal contempt). We have no reason to believe that subjecting petitioners to the requirements of *Ryan, supra*, will result in an effective elimination of meaningful appellate review.

The petition is denied, and the stay entered by this court on June 28, 1974 is vacated.

It is so ordered.

Order of the United States Court of Appeals Granting Stay, Filed March 21, 1975

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 74-1661

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., and NATIONAL RIGHT TO WORK COMMITTEE,

Petitioners,

—v.—

HONORABLE CHARLES R. RICHEY, District Judge, United States District Court for the District of Columbia,

Respondent.

Before:

McGOWAN, TAMM and ROBINSON,
Circuit Judges.

ORDER

On consideration of petitioners' motion for stay of District Court order pending filing of petition for stay in the Supreme Court, and of the opposition thereto, it is

ORDERED by the Court that petitioners' motion is granted and the aforesaid order of the District Court is stayed for a period of ten days from the date of this order. Should a petition for stay be filed with the Supreme Court within this ten day period, this stay shall remain in effect until the disposition thereof.

Per Curiam

Order of the Supreme Court of the United States Denying Stay, Filed April 14, 1975

The application for a stay of the disclosure order of the United States District Court for the District of Columbia issued June 5, 1974, presented to the Chief Justice and by him referred to the Court, is denied. Mr. Justice Douglas took no part in the consideration or decision of this application.

Legislative History of the Second Proviso to Section 101(a)(4) of the Landrum-Griffin Act

(105 Cong. Rec. 6724-6725) (April 25, 1959)

"*Mr. Goldwater.* Mr. President, as time is running out, I wish to turn to page 4 of the amendment, and invite the attention of the Senator from California to line 4, page 4:

> That no employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

I think that is a good provision. I agree with the Senator from California, which may surprise him.

Mr. Kuchel. No; it does not surprise me. I think the Senator from Arizona is one Member of the Senate who deserves the salute of all of us for the constant attention he has given in this field.

Mr. Goldwater. I thank the Senator.

I ask the Senator from California if he would accept an amendment in the form of an addition; on page 4, at the end of line 6, before the period, to add the following words: 'unless such employer has no dispute, controversy, contract, connection, or relationship of any kind in any area of activity, with the labor organization against which such action or proceeding has been or is being brought by such member.'

Let us say a businessman is a neighbor of a union member, and he is trying to finance him. The businessman has no dispute with his neighbor. He may be in business

in another community. If the language proposed were to apply, it would prevent such a laboring man from being financed by his friend, the employer.

I do not think my request is an unreasonable one. I think it would add strength to the provision which has been proposed.

Mr. Clark. Mr. President, will the Senator yield?

Mr. Goldwater. I am happy to yield.

Mr. Clark. It occurs to me that, while I certainly recognize the good motives of the Senator from Arizona, the addition to the proviso might well open up an undesirable loophole. The instance cited by the Senator from Arizona is a legitimate one to raise; but, on the other hand, would it not be possible for an employer or association of employers who just did not like unions generally to finance the activities which they are forbidden to finance or encourage merely because, as a matter of philosophy—

Mr. Goldwater. I am not talking about an association in my amendment. I say 'employer.' I refer to a case in which a man who lives next door, or is a friend of the workingman, offers to finance him.

Mr. Clark. I understand. As the Senator from Tennessee knows, I had the privilege of listening to the president of the United States Steel Corp. testify before the Antitrust and Monopoly Subcommittee. He is a fine American and a great businessman, but he just does not believe in unions. From where he sits, perhaps he is right. I would not want him to finance his neighbor in order to break up a union to which he belonged.

Mr. Goldwater. Contrary to what my friend may think, I not only believe in unions; I want them to get bigger and

better. I object to the way some of them are run. I would not, for that reason, and for the fear that somebody might dislike a union, want to preclude a friend from using funds which would come under the purview of this section. I want to give him the freedom to use the funds.

Mr. Clark. I am speaking as only one of the sponsors. I dare say it is no secret that this colloquy will enable my colleagues to determine what they want to do. I think I am right, but if my colleagues desire to accept the amendment of the Senator from Arizona, I would have no serious objection to accepting his amendment.

Mr. Goldwater. While the Senators in this part of the Chamber are deciding on the language, I wish to state that the Senator from California did not finish reading his amendment to title II, Reporting by Labor Organizations. It contains the language which is contained in the committee bill, I certainly have no objection to it. I make that statement so the Senator from California will not need to read it.

May I now ask to what conclusion my friend has come about my suggested change?

Mr. Kuchel. I say this, Mr. President, that language is not sufficiently clear to the coauthors of the amendment who are in this part of the Chamber at present for me to stand up and say, 'We accept it.'

The sentence we are discussing, which my friend from Arizona would like to amend by adding more words to it, reads:

> No employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

That is all that clause states. In other words, it would be an unfair practice, it would be against the law, for an employer or an employer association, directly or indirectly, to spend any money or otherwise to get into that type of situation, unless it were a party. Is that not good public policy?

I do believe we ought not to clutter up that language. It is clear. The provision is an attempt to protect a union member who may be engaged in a dispute with the organization. My colleagues would not want me to accept the amendment.

Mr. Goldwater. Let me ask another question. Let us suppose the man to whom we are giving these rights has no money to enable him to go to court, has no money with which to finance a suit, but has a friend, who is an employer, who says, 'John, I will lend you the money to go into court —but wait a minute; I cannot do it, because no employer can do it.' Are we not tampering with the basic right of a man to borrow a dollar or two from a friend?

Mr. Mundt. Mr. President, will the Senator yield?

Mr. Goldwater. I yield.

Mr. Mundt. It seems to me he could not go to any bank, either, if the bank is an employer.

Mr. Goldwater. The Senator from South Dakota has made a good point. He could not go to a bank to borrow the money, because the bank would be an employer. In fact, the union member could not borrow it from his own union, because his union is an employer.

Mr. Clark. Mr. President, will the Senator yield?

Mr. Goldwater. I yield.

Mr. Clark. It occurs to me that we ought to make very clear at this point, by the legislative history, if my friend will indulge me, that the somewhat strained construction of the word 'employer' which has been given in the last colloquy is not intended by anybody to apply, and that certainly an employee could go to a bank to borrow money for his defense, and there should not be a shadow of doubt about it.

Mr. Mundt. Could the Senator from Pennsylvania tell us of a bank which is not an employer?

Mr. Goldwater. Under this language the union member could not do it.

Mr. Kuchel. Mr. President, if the Senator from Arizona will yield, it has been suggested by the senior Senator from New York that the word 'interested' could be added in line 4, after the word 'no', so as to make the language read, 'no interested employer or employer association.' If the Senator would accept that amendment, with the legislative history which has been developed, I think it would solve his problem.

Mr. Goldwater. Will the Senator explain what that means?

Mr. Clark. If the Senator will yield, I think it would clearly mean the language would not include a bank.

Mr. Javits. Mr. President, will the Senator yield?

Mr. Goldwater. I understand what it means, but we want to make a legislative history. I want the proponents of this interesting word 'interested' to explain it.

I yield to the Senator from New York.

Mr. Javits. I have in mind the fact that an employer who has an interest in the litigation ought not to bring pressure upon a union. In the eventuation of a relationship of the litigant to the union, an interested employer should not be a party to finance the suit.

We ourselves are so against antibarratry statutes that I do not want to be a party to a law which would prevent a union member from finding a friend, who happens to be an employer of people in a totally unrelated business, a bank or anything else, to loan him the money. We should not have a law to make it impossible to borrow from a friend to start a suit.

Mr. Allott. May I ask a question, for the legislative history?

Mr. Goldwater. I yield.

Mr. Allott. Including the word as the Senator has used it, in the opinion of the Senator would the language include 'any' employer? Let us assume that the employer is in the general grocery business. Would the word 'interested' include any other employer?

Mr. Javits. I think it probably would if the litigation involved the union in the whole line of business, because the words of art are 'employer or employer association.'

Again we have a balance of convenience. Neither side ought to trim this, and that is why I have given the legislative history."